No. 5095

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In the

United States Circuit Court of Appeals

For the Ninth Circuit

THE JAPANESE STEAMSHIP "BOSTON MARU"

UNITED STATES OF AMERICA,
Appellant,

vs.

KOKUSAI KISEN KABUSHIKI KAISHA, a Corporation, Claimant of the Japanese Steamer "BOSTON MARU," Her Engines, etc.,
Appellee.

and

UNITED STATES OF AMERICA, as Owner of the American Steamship "WEST KEATS," in Personam,
Appellant,

vs.

KOKUSAI KISEN KABUSHIKI KAISHA, a Corporation.
Appellee.

Appellee's Brief

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MCCAMANT & THOMPSON and
RALPH H. KING,
Proctors for Appellee.

ARMBRUSTER & RENFRO, INC.

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STATEMENT OF FACTS

This case arises out of a collision between the "West Keats" and the "Boston Maru" at a point in the Columbia River opposite Columbia City on the early morning of October 26th, 1924. The United States as the owner of the "West Keats" libeled the "Boston Maru" and Kokusai Kisen

Kabushiki Kaisha, the owner of the "Boston Maru," filed a libel in personam against the United States. The two proceedings were consolidated under the above title.

The case was tried before the Honorable Robert S. Bean, who found the "West Keats" wholly at fault and passed a decree accordingly. The damages of the respective parties were fixed by stipulation. In accordance with this stipulation a decree was rendered in favor of the owner of the Japanese vessel in the sum of $15,788.91. The "Boston Maru" on the 25th of October, 1924, was berthed at the Clark-Wilson Mill at Linnton in the Willamette River. About 5:40 on the afternoon of that day she left down the river for the purpose of taking on additional cargo at St. Helens (Gildez 307). St. Helens is located up on Willamette Slough which branches off the main channel of the Columbia River a short distance above Columbia City. The "Boston Maru" drew twenty-six feet one inch (Gildez 307, 325; Sayeki 511). At that season of the year the Columbia River is low and in order to get into St. Helens it is necessary for vessels to await the flood tide. Under the circumstances of this case it was necessary for the "Boston Maru" to go down the main ship channel in the Columbia River to Columbia City and there anchor until the tide would permit her to steam up the Columbia River and the Willamette Slough to St. Helens (Sullivan 197-198; Grunstad 184; Baldy 157). The "Boston Maru" reached Columbia City about 8:30 P. M. (Sayeki 497; Gildez 307). At that point the width of the

deep water is approximately twelve hundred fifty feet (Sullivan 229; Gildez 309; Berry 353).

The "Boston Maru" was navigated under the direction of Captain George F. Gildez, a Columbia River Pilot, who has been operating on the Columbia River either as a Master or Pilot since 1910, and whose qualifications are proved by the testimony. Captain Gildez anchored the vessel abreast of the front range light on the Columbia City range about the center of the deep water (Gildez 308). After the anchor was dropped and the vessel had steadied at her anchorage, bearings were taken with three of the lights on the Columbia River (Gildez 310-311; Tomita 550; Chiga 532, 552-553). These bearings make it possible to plat the position occupied by the "Boston Maru" with substantial accuracy. It sufficiently appears from the exhibits in evidence that the vessel was anchored slightly nearer the Washington side of the deep water than the Oregon shore. There is shown on the official charts a shoal at the Washington side of the channel created by the dumping of gravel in August, 1921 (Stipulation 193). On the edge of this shoal, as marked on the official chart, the depth of the water is twenty-six feet, and a little further to the Washington shore the depth is only twenty-five feet. At the time of the collision the water in the Columbia River was about one foot above zero at St. Helens (Gildez 326). The evidence is to the effect that a vessel should have at least a foot of water below her keel in order to navigate safely (Gildez 341). Captain Gildez was familiar with the shoal and

with the chart upon which it is shown (Gildez 308-309). He knew that the incoming tide would swing the "Boston Maru" and it was not possible to tell in advance which way the vessel would swing (Gildez 309; Berry 141; Moran 252, 258; Sullivan 218). Captain Gildez endeavored to anchor in the middle of the deep water so that the vessel would stay clear of the shore whichever way she swung (Gildez 310, 333). The "Boston Maru" was four hundred feet long (Record 10, 21).

The evidence is that the incoming tide will cause an anchored vessel to move forward on her chain until her bow is substantially above her anchor, and that she will then swing slowly on a radius not much greater than her length (Sullivan 200; Moran 250-251; Allyn 260; Grunstad 186; Gildez 342).

In this case the "Boston Maru" swung toward the Oregon shore. The weight of the evidence indicates that at the time of the collision she was lying nearly at right angles to the thread of the stream. There was approximately two hundred fifty feet of deep water between her stern and the Oregon shore and fully six hundred feet of deep water between her bow and the shoal above referred to.

Immediately on anchoring the "Boston Maru" her anchor lights were displayed (Gildez 310-311; Tomita 549; Sayeki 464, 504-505). Captain Moran passed down the Columbia River at midnight with the "Georgina Rolph" drawing twenty-

three feet of water (Moran 248). The anchor lights of the "Boston Maru" were burning at this time (Moran 248-249). They were still burning at and after the collision (Swenson 383, 392; Berry 100, 101; Komiyama 562; Sayeki 509; Chiga 540).

The "West Keats" left terminal No. 4 in the Willamette River about 10:50 P. M. on the 25th of October, 1924 (Berry 95). She was in charge of Capain E. H. Berry, one of the Columbia River Pilots. She is a vessel four hundred ten feet in length, drawing at this time twenty-five feet eight inches (Berry 141). Her Master testifies that at full speed she would make ten knots an hour (Swenson 386). There is other testimony offered on behalf of Appellant to the effect that her speed on this particular night was 8.84 nautical miles per hour (Gillette 410). The "West Keats" entered the Columbia River at midnight and operated at full speed from the time she entered the Columbia River until 1:43 on the morning of October 26th, 1924 (Berry 96, 138; Jetts 454-455, 457; Gillette 408-410).

From Warrior Rock, three miles above the place of the collision, there is an unobstructed view of the portion of the river in which the "Boston Maru" was anchored (Sullivan 198-199; Allyn 262). Captain Berry, pilot of the "West Keats," admits that he saw the lights of the "Boston Maru" two miles above the place of the collision (Berry 137). One mile above the place

of the collision he knew that the lights were those of a vessel at anchor (Berry 100, 101, 117, 138). He also knew that there was plenty of room to pass the "Boston Maru" on the Washington side of the channel (Berry 121). All of the evidence is to the effect that the visibility was good on the night in question (Swenson 381; Gillette 408; Sayeki 465; Chiga 536).

Half a mile above the place of collision Captain Berry gave the order "port a bit" and then the order "steady" (Berry 107). The next order was "starboard a bit" (Berry 108). The ship did not respond to her helm when this order was given and the order "hard a starboard" followed. Again the vessel failed to respond to her helm, according to appellant's testimony. The next order, given one minute before the collision, was "stop" (Berry 109). The testimony does not satisfactorily show the interval between these orders or the time at which the order "port a bit" was given (Berry 113).

There is no contention that the speed of the "West Keats" was appreciably checked by the "stop" order given one minute before the collision. The hawse pipe, four or five feet off the bow on the starboard side of the "West Keats," hit the "Boston Maru" starboard counter-aft (Berry 131-134). The blow was a glancing blow and the "West Keats" passed on between the Oregon shore and the stern of the "Boston Maru" (Swenson 395). In two or three minutes Captain Berry had the "West Keats" turned around and

he brought her back on the Washington side of the "Boston Maru" without difficulty (Berry 121-122). Immediately after the collision Captain S. S. Baldy passed up the river in charge of the Norwegian steamer "Siersted." He passed both the "Boston Maru" and the "West Keats" on the Washington side of the channel without difficulty (Baldy 152-153). There seems to have been another vessel as well which passed up the river on the Washington side about this time (Swenson 385; Berry 114-115).

After the collision both vessels proceeded back to Portland to make the necessary repairs.

The apostles do not contain the opinion given orally by Judge Bean on the 22nd of November, 1926, in deciding the case. Believing that the opinion will be of assistance to the court we print it:

> "The cases of the Boston Maru and the West Keats grew out of the collision of the West Keats with the Boston Maru while the latter was lying at anchor in the Columbia River.
>
> "The case is important enough to merit a carefully prepared opinion, but the time at my disposal will not enable me to do so, without unnecessarily delaying the decision in this case, and I take it, it is more to the interest of the parties to have the case promptly disposed of, than it is that the court shall delay the decision in order to formulate an elaborate opinion. I therefore

shall state my conclusions in this case without elaboration.

"It appears from the evidence that about half past eight o'clock on the evening of October 25, 1924, the Boston Maru, a vessel about four hundred feet long and drawing twnty-six feet of water, was anchored in the Columbia River about the middle of the ship channel or deep water, opposite Columbia City, to await the tide, in order that she might dock at St. Helens. The deep water at that point is from twelve to thirteen hundred feet wide. The vessel was anchored with her stem upstream, and had out about thirty fathoms of chain. During the night her position was shifted by the tide, so that at the time of the collision she was lying substantially athwart the river. Her anchor lights were in position and burning brightly, and visible to a vessel approaching from upstream for a considerable distance.

"About two o'clock in the morning of the 26th, the West Keats, a vessel four hundred and ten feet long and eight thousand tons gross tonnage, fully loaded, was coming down the river and collided with the Boston Maru, damaging both vessels. Each claims the other was at fault, and each has filed a libel.

"It is a rule of law that where a moving vessel collides with a vessel at anchor, the presumption is that the fault is chargeable to the moving vessel. It is claimed, however, that this rule should not be applied in this case, because the Boston Maru was anchored in violation of a statute which makes it un-

lawful to tie up or anchor a vessel in the navigable channel in such a manner as to prevent or obstruct the passage of other vessels. This statute, however, does not impose an absolute or unreasonable prohibition to the use of the waterways for anchorage. The question in each case is whether the anchored vessel is so placed as to prevent or interfere with navigation. In my opinion the Boston Maru was not so anchored.

"The night was dark and cloudy and her pilot had to be guided entirely by the shore lights. There is no established anchorage ground at the place of this collision, although the evidence shows that vessels have frequently anchored there or near there. It was good seamanship for the pilot to so anchor his vessel that it would not ground in case she should swing. It is said that she should have been anchored near the Washington shore, but the chart offered in evidence shows shoal water on that side, and I take it that it would have been unsafe for him to have anchored any nearer the Washington shore than she did anchor.

"The burden therefore is on the West Keats, in my opinion, to show that the collision was not due to her fault, and this I think she has failed to do.

"Her pilot observed the anchor lights of the Boston Maru when about a mile and a half upstream from her, and at that time knew that a vessel was at anchor athwart the stream. In place of slacking the speed of his vessel or taking any precaution to ascertain the actual location of the anchored vessel he

proceeded downstream at full speed until just a short distanc above the Boston Maru, and then attempted to pass to the left or Oregon side. In my judgment it is negligence for a vessel to so approach an anchored vessel on a dark night at full speed and attempt to pass her on the Oregon side without ascertaining the location of the anchored vessel, or at least making some effort to do so. The statute provides that in narrow channels every steam vessel, when safe and practicable, shall keep to that side of the fairway or midchannel which lays on the starboard side of such vessel. Whether this statute applies only to passing vessels, it nevertheless indicates the proper movement of a vessel, in requiring it to keep to its own side of the channel. The West Keats did not do this but attempted to pass on the Oregon side or to her port side, and in my judgment the collision was due entirely to her fault.

"Decrees may be prepared accordingly."

POINTS AND AUTHORITIES

I.

The conclusions of the trial court in an admiralty case embodied in its findings and decree will be set aside on appeal only for manifest error.

The Bailey Galzert, 179 Fed. 44, 48.
Spencer v. The Dalles Navigation Co., 188 Fed. 865, 868.
The Samson, 217 Fed. 344, 347.
Stern v. Fernandez, 222 Fed. 42, 45-46.
The Dolbadarn Castle, 222 Fed. 838, 840.
The Yucatan, 226 Fed. 437, 441.

The Hardy, 229 Fed. 985, 986-987.
The Mazatlan, 287 Fed. 873, 875.
Butler v. Pacific Mail Steamship Co., 290 Fed. 806, 807.

II.

When a moving vessel collides with a vessel at anchor, the presumption is that the fault is chargeable to the moving vessel.

The Oregon, 158 U. S. 186, 39 L. Ed. 943.
The Europe, 190 Fed. 475 (C. C. A. 9).
The John G. McCullough, 232 Fed. 637.
The Gulf of Mexico, 281 Fed. 77, 79 (C. C. A. 2).
The Cananova, 297 Fed. 658, 663.
The No. C-4, 300 Fed. 757.
U. S. v. King Coal Co., 5 F. (2d) 780 (C. C. A. 9).
The Waterford, 6 F. (2d) 980, 981 (C. C. A. 2).

III.

It is the duty of a moving vessel to maintain a vigilant outlook.

The Europe, 190 Fed. 475, 480.
The R. G. Townsend, 205 Fed. 514.
The John G. McCullough, 232 Fed. 637, 638-639.
The Kathleen Tracy, 296 Fed. 711, 712.

IV.

The inability to distinguish between the lights of a vessel at anchor and lights on the shore will

not excuse a moving vessel for colliding with a vessel at anchor.

The John G. McCullough, 232 Fed. 637, 638-639.

V.

Where the field of vision is clear, the failure of the officers on the bridge to observe a vessel at anchor whose lights are properly set, in time to avert a collision, is negligence for which the moving vessel will be held responsible.

The Oregon, 158 U. S. 186, 39 L. Ed. 943.
The New York, 175 U. S. 187, 204, 44 L. Ed. 126, 134.
The Europe, 190 Fed. 475.
Pendleton Bros. v. Morgan, 11 Fed. (2d) 67.

VI.

A vessel navigating the Columbia River is chargeable with notice that it is customary for vessels to anchor therein.

The Oregon, 158 U. S. 186, 39 L. Ed. 943.

VII.

In cases of doubt or uncertainty a vessel's headway should be checked and she should be navigated with caution until the uncertainty is cleared up.

Hayne on the Rule of the Road at Sea, 18.
The Owego, 71 Fed. 537, 544.
The Maine, 2 F. (2d) 605, 607.
The Buenos Aires, 5 F. (2d) 425, 428.

The Brinton, 50 Fed. 581.
The Libby Maine, 3 F. (2d) 79, 80.
The Lizzie M. Walker, 3 F. (2d) 921, 922.

VIII.

The test of proper speed is the ability of the vessel to stop her headway in the presence of danger.

Hayne on the Rule of the Road at Sea, 19.

IX.

It is dangerous to pass an anchored or incumbered vessel at full speed in the night time.

The Howard Reeder, 207 Fed. 929, 933.
The Hamilton, 212 Fed. 1016.

X.

It is negligence for a moving vessel to approach too close to another vessel when there is room in the channel for safe passage.

The Chatham, 52 Fed. 396, 399.

XI.

In narrow channels it is the statutory duty of steam vessels to pass to the starboard.

U. S. Code, Title 33, Sec. 210, Sec. 7899 Comp. Stat., 30 Statutes 101.
The Kathleen Tracy, 296 Fed. 711.
Bisso Towboat Co. v. U. S., 6 F. (2d) 132.

XII.

Custom cannot be relied upon to relieve from the obligation of the above statute.

Occidental Company v. Smith, 74 Fed. 261, 267-268.

XIII.

Where a moving vessel violates a statute enacted to make navigation safe, the burden devolves on such vessel to show that such breach of statutory duty could not have been one of the causes of the collision.

The Norfolk, 297 Fed. 251.

XIV.

A navigator is chargeable with notice of the effect of suction from the bank. If he runs at a speed and on a course which causes his vessel to sheer off because of suction, he is responsible for the resulting damage.

The Howard Reeder, 207 Fed. 929, 933.
The Hamilton, 212 Fed. 1016.
The Monroe C. Smith. 201 Fed. 569, 572.

XV.

The "Boton Maru" is not held to a standard of care exceeding that habitually exercised by prudent mariners. It was not the duty of the Japanese vessel to put out more than one anchor.

The City of Richmond, The Texan, 265 Fed. 722, 725.

XVI.

The anchorage statute, Section 9920, Compiled Statutes, does not forbid anchorage in the channel of the Columbia provided there is room left in the channel for other vessels to pass.

The Europe, 190 Fed. 475, 478.
The Northern Queen, 117 Fed. 906, 912-913.
The Job H. Jackson, 144 Fed. 896, 900.
The John G. McCullough, 232 Fed. 637.
The Grand Manan, 208 Fed. 583, 587-589.
Strathleven Steamship Co. v. Baulch, 244 Fed. 412, 414.
The Bailey Gatzert, 179 Fed. 44, 49-50.
Compania De Navegacion v. Boston Virginia Co., 278 Fed. 868, 870.
The Waterford, 6 F. (2d) 980, 981.

XVII.

Anchorage in an improper place does not deprive a vessel of the protection of the laws. She may still recover damages sustaind through collision with a moving vessel where the latter vessel with ordinary prudence could have avoided the collision.

The Yucatan, 226 Fed. 437, 439.
American-Hawaiian Co. v. King Coal Co., 11 F. (2d) 41, 43.
The Kathleen Tracy, 296 Fed. 711, 712.
The Waterford, 6 F. (2d) 980, 981.
The Daniel McAllister, 258 Fed. 549, 552.

XVIII.

A custom or usage must be certain and uniform; otherwise it furnishes no standard for determining whether conduct was prudent or negligent.

Chicago Milwaukee Co. v. Lindeman, 143 Fed. 946, 949 (C. C. A. 8).

Fogarty v. Michigan Central, 180 Mich. 422, 147 N. W. 507, 510.

Chicago & Alton Co. v. Harrington, 192 Ill. 9, 61 N. E. 622, 629.

QUESTIONS AT ISSUE

The contentions of appellant with reference to the charges preferred by appellant against the "Boston Maru" as set forth in its libel and particularly on pages 14 and 23 of the record, are substantially these:

(1) That the "Boston Maru" was improperly anchored in a fairway.

(2) That the vessel was anchored in such a manner as that she would swing broadside to the current and that she was negligently permitted so to swing.

(3) The pilot and officers of the "Boston Maru" failed to give warning of her position to those navigating the "West Keats."

Appellee in its amended libel, abstract pages 34 and 35, makes substantially the following

charges with reference to the navigation of the "West Keats":

(1) The pilot in charge of the "West Keats" confused the anchor lights of the "Boston Maru" with lights on the Oregon shore. He did this although he was chargeable with notice that ships were in the habit of anchoring off Columbia City.

(2) The officers charged with the navigation of the "West Keats" failed to check her speed when the anchor lights of the "Boston Maru" became visible. The "West Keats" was negligent in operating at full speed up to one minute before the collision.

(3) The "West Keats" violated a statutory duty in failing to pass the "Boston Maru" on the Washington or starboard side of the channel.

(4) That the "West Keats" was negligently navigated and permitted to collide at substantially full speed with an anchored vessel whose lights were burning and actually seen by the pilot and officers of the "West Keats."

(5) The "West Keats" was negligent in attempting to pass between the "Boston Maru" and the Oregon shore.

(6) Shortly before the collision the "West Keats" failed to respond to her helm either because of negligence in her navigation or because her steering gear was out of order.

ARGUMENT

Respect Due to Findings of District Court.

The decree of the trial court passed upon all of the substantial questions which are in dispute between the parties on this appeal. The conclusions of the Distrtict Court are set forth in the opinion already quoted, and have been incorporated in the decree found on pages 41 and 42 of the record. We quote from this decree:

> "The Court finds that the "Boston Maru" was anchored at a suitable place in the Columbia River at the time of the collision and that it would not have been good seamanship to have anchored the said vessel materially closer to the Washington shore for the reason that the vessel in such event might have swung on to a gravel shoal marked on the chart; the Court also finds that the anchor lights of the "Boston Maru" were in position and burning brightly; the Court also finds that the pilot of the "West Keats" observed the anchor lights of the "Boston Maru" when about a mile and one-half upstream from her and the pilot knew at that time that a vessel was at anchor athwart the stream; that notwithstanding such knowledge the pilot of the "West Keats" neglected to slacken the speed of his vessel or to take any precaution to ascertain the actual location of the anchored vessel, and that the "West Keats" proceeded downstream at full speed until a short distance above the "Boston Maru"; that thereupon the pilot of the "West Keats" endeavored to pass to the left of the "Boston Maru." That the negli-

gence of the pilot of the "West Keats" in the respects aforesaid is solely responsible for the collision."

This court has repeatedly announced the rule applicable in admiralty with reference to the respect to be given on appeal to the findings of the trial court.

Spencer v. The Dalles Navigation Co., 188 Fed. 865, 868.

In this case the court speaking through Judge Dietrich said:

> "The District Judge heard the witnesses testify, and observed their demeanor while upon the stand. His finding upon the conflicting evidence was that the Charles R. Spencer alone was responsible for the collision, and that the Dalles City was wholly without fault. Under the well-settled rules of appellate procedure, the finding ought not, under the circumstances, to be disturbed."

The Samson, 217 Fed. 344, 347-348.

In this case the court speaking through Judge Morrow said:

> "Out of the great mass of conflicting testimany with respect to the maneuvers of the respective vessels prior to the collision, and the positions of the various tows thereafter, the learned judge of the court below found that the point of collision was well to the Oregon side of the channel, and concluded

that the fault was with the Samson. This finding, under well-settled rules of appellate procedure, should not be disturbed. Spencer v. Dalles, P. & A. Navigation Co., 188 Fed. 865, 868, 110 C. C. A. 499. As said by this court in The Alijandro, 56 Fed. 621, 6 C. C. A. 54:

> " 'The rule is well settled that in cases on appeal in admiralty, when the questions of fact are dependent upon conflicting evidence, the decision of the district judge, who had the opportunity of seeing the witnesses and judging their appearance, manner, and credibility, will not be reversed, unless it clearly appears that the decision is against the evidence.' "

The above rule has been announced again and again by this court and the principle must be deemed to be firmly settled in this jurisdiction. See for example the following cases:

The Bailey Gatzert, 179 Fed. 44, 48 (Judge Morrow).

Stern v. Fernandez, 222 Fed. 42, 45-46 (Judge Morrow).

The Dolbadarn Castle, 222 Fed. 838, 840 (Judge Gilbert).

The Yucatan, 226 Fed. 437, 441 (Judge Rudkin).

The Hardy, 229 Fed. 985, 986-987 (Judge Gilbert).

The Mazatlan, 287 Fed. 873, 875 (Judge Rudkin).

Butler v. Pacific Mail Steamship Co., 290 Fed. 806, 807 (Judge Rudkin).

PRESUMPTION AGAINST MOVING VESSEL.

Where a moving vessel collides with a vessel at anchor, the presumption is that the fault is chargeable to the moving vessel.

The Oregon, 158 U. S. 186, 39 L. Ed. 943.
The Europe, 190 Fed. 475 (C. C. A. 9).
The John G. McCullough, 232 Fed. 637.
The Gulf of Mexico, 281 Fed. 77, 79 (C. C. A. 2).
The Cananova, 297 Fed. 658, 663.
The No. C-4, 300 Fed. 757.
U. S. v. King Coal Co., 5 F. (2d) 780, (C. C. A. 9).
The Waterford, 6 F. (2d) 980, 981 (C. C. A. 2).

NO FAULT IN ANCHORAGE.

Appellant contends that appellee is not entitled to the above presumption because the "Boston Maru" was anchored in a fairway. Appellant's contention is that the channel was along the Oregon shore and that the "Boston Maru" was chargeable with negligence in anchoring too close to the Oregon shore.

The contention of appellant in this respect is not borne out by the evidence. The ship channel is the portion of the river where the water is thirty feet deep. This is the testimony of five pilots (Sullivan 220; Moran 250; McNelly 277; Chase 298; Gildez 309).

The position of the "Boston Maru" as it appears on "West Keats'" Exhibit 1 is subject to correction. The evidence clearly shows that a vessel in swinging under the influence of an incoming tide will ride up over her anchor chain and swing on a radius not much greater than her length (Grunstad 186; Sullivan 200; Moran 250-251; Allyn 260; Gildez 342). The length of the "Boston Maru" is four hundred feet, and she must have swung on a radius not appreciably greater than this figure. The deep water at the place where the "Boston Maru" was achored is approximately twelve hundred fifty feet in width (Berry 353; Gildez 309; Sullivan 229). We think the evidence sustains our contention that even though the "Boston Maru" was lying directly athwart the channel at the time of the collision her stern was approximately two hundred fifty feet from the edge of the channel on the Oregon side. There was approximately six hundred feet between her bow and the gravel shoal. Captain Berry admits that there was plenty of room to pass on the Washington side (Berry 121). Under the statute it was clearly his duty to pass on the Washington side. Captain Berry had no difficulty in getting up on the Washington side of the "Boston Maru" (Berry 121).

About midnight on the night of the collision Captain Moran took the "Georgina Rolph" down the river on the Washington side of the "Boston Maru." This vessel drew twenty-three feet and her pilot had no difficulty in getting her by (Moran 248). Captain Baldy immediately after

the collision brought the "Siersted" up the river on the Washington side of the "Boston Maru" also without difficulty (Baldy 152). Another unidentified vessel came up the river on the Washington side of the "Boston Maru" on the night of the collision (Berry 114-115; Swenson 385).

In this case it was necessary to anchor in the channel (Gildez 331). Between Portland and Astoria there are only two places where a pilot can anchor a deep draft vessel out of the fairway. One of these is at Oak Point or Quinns and the other at Longview or Rainier (Sullivan 246-247; Allyn 263; McNelly 274).

It is impossible for a pilot to tell in advance which way his vessel will swing under the influence of the incoming tide (Berry 141; Moran 252, 258; Sullivan 218; Gildez 309). For this reason it was good practice for Captain Gildez to anchor the "Boston Maru" in the middle of the deep water (Moran 257; Sullivan 198). Captain Allyn and Captain Sullivan, both experienced and competent pilots, state that they would have anchored the "Boston Maru" where Captain Gildez did (Allyn 259; Sullivan 197).

It is also to be said that after dark it is difficult if not impossible for a pilot to fix accurately the place of his anchorage (Sullivan 197; Allyn 259, 267, 270). If the conclusion can be drawn from the testimony that it would have been better for Captain Gildez to have anchored further toward the Washington shore, he cannot

be held to a larger measure of diligence than that which would be exercised by an ordinarily prudent navigator, and in view of the difficulty of fixing the place of anchorage accurately, any small departure from the proper point of anchorage cannot be deemed to be negligence.

Suggestion is made that the "West Keats" could have been anchored further down the river where the channel is wider. Captain Allyn and Captain Sullivan answer this suggestion. There is no light on the shore to guide a pilot with reference to anchorage at a point down the river from the lower Columbia City light, opposite which the "Boston Maru" was anchored. The testimony is without contradiction that it is impracticable to anchor at night without a light on the shore to guide the pilot. (Sullivan 221-222, 233; Allyn 259-260).

The contention is that the "Boston Maru" should have been anchored on the so-called "red range." Testimony is that this is not a range at all (Sullivan 222) and that it was unknown to Captain Gildez (Gildez 323). If the "Boston Maru" had been anchored on this so-called "red range" and the vessel had swung to the Washington side her stern would have grounded on the shoal. This will be apparent to the court from an examination of "West Keats' " Exhibit 1. There is twenty-six feet of water on the edge of the shoal and the depth diminishes to twenty-five feet further in. The river at this time at St. Helens was one foot above zero (Gildez 326).

The "Boston Maru" drew twenty-six feet, one inch. Careful navigation requires one foot of water below the keel of the vessel (Gildez 341). The testimony of appellant's own witnesses is that a vessel drawing twenty-five feet or more of water must look out for the shoal marked on the government chart opposite Columbia City (Sandstrom 161; Baldy 156-158).

Captain Sullivan testifies (201) that a gravel shoal will not wash away. This is common sense and in accord with the experience and observation of all men.

It is sufficient for our purposes that the shoal is marked on the government chart. The pilots navigating the Columbia River depend upon these charts (Berry 124; Sullivan 225). It is true that a pilot will occasionally take a sounding, but it is wholly apart from his duties to chart the river. It is the function of the War Department to make soundings and to issue charts for the guidance of navigators using the river. Captain Gildez would have laid himself open to just criticism if he had navigated in disregard of the soundings shown on the government chart.

When the "Boston Maru" was anchored her anchor lights were displayed (Gildez 310-311; Sayeki 464, 504-505; Tomita 549). The lights were still burning when Captain Moran passed down the river at midnight (Moran 248-249). They were also burning at and after the collision (Berry 100-101; Swenson 383, 392; Komiyama

562; Sayeki 509; Chiga 540). There was an unobstructed view from Warrior Rock on (Allyn 262; Sullivan 198-199). Warrior Rock is three miles above the place of collision. The visibility was good (Swenson 381; Gillette 408; Sayeki 465; Chiga 536). As a matter of fact Captain Berry on the bridge of the "West Keats" saw the lights of the "Bostotn Maru" when he was two miles away (Berry 137). He recognized that these were the lights of a vessel at anchor when he was one mile away (Berry 138, 100, 101, 117). Mr. Gillette, second officer on the "West Keats," testifies that there would have been no difficulty in passing the "Boston Maru" on the Washington side of the channel if the maneuver had been made at that time (Gillette 429).

LAW APPLICABLE.

Appellant claims that the "Boston Maru" violated Section 9920 of the Compiled Statutes. This section is as follows:

> "It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft."

This statute has been frequently construed by the courts, including this court, and it is well established that a vessel at anchor is not violating the statute provided she leaves sufficient room in the channel for other vessels to pass. A decision of this court is one of the leading cases in the construction of this statute.

The Europe, 190 Fed. 475, 478.

Here the court said:

> "The argument based upon the first and third grounds, as stated above, is completely refuted by the decision of the Supreme Court in the case of The Oregon, 158 U. S. 186. On the authority of that case, we hold the law to be settled that an ocean-going vessel may lawfully lie at anchor in the night time in the deep channel of a navigable river, if not so placed as to prevent or obstruct the passage of other vessels, in violation of the act of Congress prohibiting such obstruction. 30 U. S. Stat. 1152; U. S. Compiled Stat. 1901, 3543; 6 F. S. A. 817; Pierce's Fed. Code, No. 11105. We also hold that the words 'prevent or obstruct,' in this statute are positive words, indicative of limited restraint and of legislative intent to not interfere with the right use of waterways by imposing an absolute or unreasonable prohibition."

The John J. McCullough, 232 Fed. 637.

In this case the District Court for Virginia said:

> "That the Begonia cannot be held to be at fault in anchoring where she did under the law (30 Stat. 1152, No. 15) particularly as settled in this circuit. The Job H. Jackson (D. C.), 144 Fed. 900, 901; The Hilton (D. C.), 213 Fed. 997, 1000; The Caldy, 153 Fed. 837, 840, 83 C. C. A. 19; The Margaret J. Sanford (D. C.), 203 Fed. 331; Id. 213 Fed. 975, 130 C. C. A. 381. The last citation is the decision of the Circuit Court of Appeals of this circuit,

and to that case, and the cases therein cited, reference is made, as giving the law applicable to the anchorage of vessels, which is briefly to the effect that it was not the purpose of the act of Congress in question to absolutely forbid anchoring in navigable streams, other than at such places as would necessarily prevent the passage of vessels, or obstruct them in passing, to such an extent as to make the effort to do so a dangerous maneuver, and that if a vessel anchored at a point in the channel where, notwithstanding such anchorage, other vessels navigating with the care the situation required, could safely pass, then she neither violated the statute, nor rendered herself liable under the general rules applicable to navigation, even though in some degree she obstructed the channel."

The Grand Manan, 208 Fed. 583.

This was a decision rendered by the District Court for Maine. On page 587 of the report the court quotes section 9920 of the Compiled Statutes. It is thereupon said:

"This act seems to be declaratory of the general maritime law upon the subject."

On pages 587 and 588 the court further says:

"In The Europe, 190 Fed. 474, 479, the Circuit Court of Appeals for the Ninth Circuit held that a vessel might lawfully lie at anchor in the night time in the deep channel of a navigable river, if not so placed as to prevent or obstruct the passage of other vessels in violation of the act of Congress prohibiting such obstruction. The court said: 'We also hold that the words "prevent or obstruct" in

this statute are positive words, indicative of limited restraint and of legislative intent to not interfere with the right use of waterways by imposing an absolute or unreasonable prohibition.'"

The court cites and discusses a number of authorities. On page 589 it is said:

> "The test generally applied by the courts is whether the vessel is so anchored as to leave a sufficient passageway for others."

Strathleven Steamship Co. v. Baulch, 244 Fed. 412, 414.

Here the Circuit Court of Appeals for the Fourth Circuit says:

> "If a vessel anchors at a point in a channel where, notwithstanding such anchorage, other vessels navigated with care can safely pass, she does not violate the statute or render herself liable under the general rules of navigation, although she obstructs the channel to a certain extent. On the other hand, if the anchored vessel occupies so much of the channel as to practically impede its navigation or make the effort to pass her a dangerous maneuver, she has placed herself in a position which the statute forbids, and must take the consequences of her unlawful act."

The Northern Queen, 117 Fed. 996, 912-913.

Here the court said:

> "The question, therefore, presented is whether the Pathfinder and Sagamore shall

> be held at fault for anchoring in the fairway in a dense fog in Whitefish Bay at the head of St. Mary's River. * * * The proofs do not establish a custom requiring anchoring out of a sailing course. No regulation prohibited it. There was no special insecurity for lying at anchor at this place, fog signals being sounded, when the fairway was one-half mile wide, with an abundance of navigable water on each side; the navigable channel being 4 miles in width at the point of collision. It has often been held that if there is no rule or custom requiring a vessel to bring up out of the fairway, she might anchor there, although directly in the track of ships. Marsden Maritime Collisions 234; Spencer, Maritime Collisions Sec. 111; The Ogemaw, 32 Fed. 924. * * * I am clearly of the opinion that there is no fault attributable to the Pathfinder for anchoring in the sailing course at this point."

The Job H. Jackson, 144 Fed. 896, 900.

Here the District Court for the Eastern District of Virginia said:

> "It may be said in passing that the trend of interpretation of the act has been to give it a liberal meaning, and that its purpose was not to prevent vessels from coming to anchor in navigable channels, but to forbid them from doing so in such manner as to obstruct said channels, or render their navigation difficult or dangerous."

To the same effect see

The Bailey Gazert, 179 Fed. 44, 49, 50.

CUSTOM OR USAGE.

It is contended that it was a custom to anchor vessels opposite Columbia City and at a point nearer the Washington shore than that occupied by the "Boston Maru," and based upon this custom it is contended that the pilot of the "Boston Maru" was guilty of negligence in anchoring at the point chosen by him.

We have already shown that a vessel drawing twenty-six feet one inch of water could not safely anchor at the point contended for by appellant. An examination of "West Keats'" Exhibit 1 will show clearly that if the "Bostton Maru" had been anchored at the point contended for and had drifted toward the Washington shore she would have drifted onto the shoal and gone aground.

Apart from this contention the evidence wholly fails to establish any such usage or custom as can serve as a guide to the court in passing on the conduct of Captain Gildez in anchoring where he did. Captain Gildez explains clearly, and we think satisfactorily, the reasons why he anchored nearly midway in the deep water. His conduct in this respect accords with the practice of other pilots, as outlined by their testimony (Moran 257; Allyn 259; Sullivan 197-198, 221). It is true that several pilots called on behalf of the "West Keats" testified that their practice accords with the alleged custom, but it is familiar law that a custom to be binding in matters of this kind must be certain and uniform.

Chicago, Milwaukee Co. v. Lindeman, 143 Fed. 946, 949.

This is a decision of the Circuit Court of Appeals for the Eighth Circuit. The litigation was a personal injury case and the custom relied upon was one with reference to the movement of a locomotive. Judge Sanborn said:

> "A custom has the force of law, and furnishes a standard for the measurement of many of the rights and acts of men. It must be certain or the measurements by this standard will be unequal and unjust. It must be uniform; for, if it vary, it furnishes no rule by which to mete. It must be known, or must be so uniform and notorious that no person of ordinary intelligence who has to do with the subject to which it relates and who exercises reasonable care would be ignorant of it; for no man may be justly condemned for the violation of a law or a custom which he neither knows nor ought to know. In short, a binding custom must be certain, definite, uniform, and known, or so notorious that it would have been known to any person of reasonable prudence who dealt with its subject with the exercise of ordinary care."

Fogarty v. Michigan Central Co., 180 Mich. 422, 147 N. W. 507, 510.

This also was a personal injury case, plaintiff relying upon an alleged custom to give warning of the approach of a backing train. The court said:

> "The most that can be said of plaintiff's evidence, taken as a whole, is that sometimes the defendant sent a man in advance of a train being backed in and sometimes stationed a brakeman upon the front end of the forward car. This situation was not such a one as would warrant plaintiff in the belief that he would be personally notified of the approach of an oncoming train by a man sent in advance. * * *
>
> "A custom must be certain, uniform, and invariable. It must also be notorious; that is, known to all persons of intelligence having to do with the subject to which it relates."

Chicago & Alton Co. v. Harrington, 192 Ill. 9, 61 N. E. 622, 629.

Here the court said:

> "A usage or custom must be certain and uniform and general. A custom is general when the method of dealing is the universal method of those engaged in the business where the usage exists."

PROXIMATE CAUSE.

Even though it were admitted that the "Boston Maru" was improperly anchored, this record would still call for an affirmance of the decree appealed from. The evidence clearly shows that the proximate cause of the collision was the negligent navigation of the "West Keats." A vessel anchoring at an improper place does not thereby forfeit the protection of the laws. It is still the duty of navigators to avoid colliding with her. A

vessel which negligently collides with her is solely responsible for the accruing damage. This court is firmly committed to this principle.

The Yucatan, 226 Fed. 437, 439.

In this case the court affirmed the decision of Judge Bean. The case involved collision with the Boston which lay at anchor in the middle of the Willamette River near the Broadway Bridge. The Court of Appeals speaking through Judge Rudkin said:

> "Assuming that the state of Oregon was guilty of negligence in mooring the Boston in the fairway, and in permitting her guns to extend beyond the rail, in violation of the ordinances of the city of Portland, such negligence would not bar a recovery if the collision could have been averted or avoided by the exercise of reasonable diligence on the part of the officers of the Yucatan. A person does not invite the destruction of his property simply by leaving it exposed in a public place, even though his act in so doing may create a public nuisance. * * * The negligence of the state, if negligent at all, would not bar a recovery, unless such negligence caused or contributed to the injury."

The above decision of Judge Rudkin has been more recently affirmed and followed:

> *American-Hawaiian S. S. Co. v. King Coal Co.,* 11 F. (2d) 41, 43.

It is suggested in appellant's brief that the above decisions are anomalous and out of har-

mony with the law declared generally by the admiralty courts. This contention certainly is in error. The rule announced by the above authorities is announced generally.

The Kathleen Tracy, 296 Fed. 711, 712.

Here the District Court for the Southern District of New York said:

> "It is true that no other vessel dragged off the anchorage ground, and that with her other anchor down, or perhaps even with a longer scope of chain on the port anchor, the steamer might not have dragged at all. But she does not become an outlaw because she dragged off the anchorage ground; nor does she become an obstruction to navigation ipso facto because she anchored again outside of anchorage grounds."

The Waterford, 6 F. (2d) 980, 981.

This is a decision by the Circuit Court of Appeals for the Second Circuit. The third paragraph of the syllabus is as follows:

> "Tug by mooring at point in canal prohibited by rule, did not contribute to collision, with its tow, of tow of moving tug, when the master of the latter, having before him in plain view all the possibilities of the situation as he came out of the lock, gave no signals, but proceeded, accepting the situation, and with reasonable navigation would have avoided collision."

Compania De Navegacion Interior S. A. v. Boston-Virginia Transp. Co. et al, 278 Fed. 868, 870

A steamship was anchored by a pilot near the left edge of the channel, and had swung toward the left bank where its stem was held by soft mud. In that position her stern was between 60 and 80 feet from the left bank of the river. The water along the left bank was shallow. In front of the steamship's bow and toward the right bank the channel was sufficiently wide and deep for safe navigation. The river at this point was between 1000 to 1200 feet wide, and the fairway from 700 to 800 feet wide. The place at which the steamship was anchored was a loading place for vessels.

In holding a tug coming into collision with the steamship to be wholly at fault, the court stated on page 870:

> "It is contended by the owner of the tug that the Stoddard was at fault in anchoring and in remaining in such a position as to obstruct navigation, and that therefore her owner cannot recover, or in the alternative, that the damages should be divided. But the evidence fails to show negligence upon the part of the Stoddard which in any degree contributed to the collision. There was ample space in the channel for other vessels to pass. On the other hand, the negligence of the tug was clearly established, and that negligence was the proximate cause of the collision. It was negligent to undertake to pass between the steamship and the bank of the river. When it became apparent to the Tomboyache

that the Stoddard was aground, either one of two courses could have been adopted to prevent the collision: The tug could have been brought to a standstill, or it could have remained in the channel. Under these circumstances, the burden was upon the owner of the tug to make the fault of the anchored vessel clearly appear. The Clarita and The Clara, 23 Wall. 1, 23 L. Ed. 146; The Virginia Ehrman, 97 U. S. 309, 24 L. Ed. 890; The City of New York, 147 U. S. 72, 13 Sup. Ct. 211, 37 L. Ed. 84; Eagle Oil Transport Co. v. Bowers Southern Dredging Co., 255 Fed. 52, 166 C. C. A. 380; The Europe, 190 Fed. 475, 111 C. C. A. 307."

The Waterford, 6 F. (2d) 980, 981.

"After colliding with a vessel at a standstill, the one navigating must exonerate herself from blame by showing that it was not within her power to prevent the collision by adopting practical precautions under the rule announced in The Gulf of Mexico (C. C. A.), 281 F. 77, and the E. S. Atwood (C. C. A.), 289 F. 737.

"The Merchant was not at fault. There is no finding of active fault as to her. It is predicated solely upon her mere presence at the point of collision, based upon an alleged controlling regulation which the District Judge referred to. The Merchant and her tow were in fact moored at the point where the Waterford emerged from the lock, and had been so moored for 20 or 30 minutes. The situation was the same then as it was at the moment of impact. There was no substantial change in her position. The master

> of the Waterford had before him in plain view all the possibilities of the situation as he came out of the lock, and gave no signals whatever but proceeded, accepting the situation. Under such circumstances, nothing in the presence of the Merchant in this water contributed to the happening of the collision, and the navigating vessel could have, with reasonable navigation, avoided the collision. The Granite State, 70 U. S. (3 Wall.) 310, 18 L. Ed. 179; The Clarita, 23 Wall, 1, 23 L. Ed. 146."

To the same effect see

The Daniel McAllister, 258 Fed. 549, 552.

The allegations of our amended libel (Apostles 31-33) lay a proper foundation for the contention which we are now making.

It should be borne in mind that it was necessary for the "Boston Maru" to anchor and await the incoming tide in order to reach St. Helens, where she was to load the remainder of her cargo. The depth of the water at low tide was not sufficient to enable the "Boston Maru" to get in to St. Helens.

ONE ANCHOR SUFFICIENT.

It is suggested in appellant's brief that the "Boston Maru" should have put out a stern anchor in addition to her bow anchor. This contention finds no support in the testimony. A number of expert witnesses were called by appellant and the failure of appellant's proctor to ask

them any questions along this line is significant. Appellee did prove by the uncontradicted testimony of Captain Sullivan that it is not customary for vessels navigating the Columbia River to put out more than one anchor (Sullivan 200). This witness also testified that the vessels navigating the Columbia River are as a rule not equipped with gear for putting out a stern anchor (200-201).

The law arising on this state of facts is clearly announced in

The City of Richmond. The Texan, 265 Fed. 722, 725.

> "Courts have occasionally suggested that under certain circumstances it may be the duty of a ship to hold herself steady by the use of both bow and stern anchors. Such observations have usually been made when the ship was so anchored that its swinging would nearly or altogether close a channel. The Texan argues that it is so rare for merchant vessels to make themselves fast in the manner suggested that an unexpected resort to it in thick weather would increase rather than diminish danger to other craft. When a ship's lights are made out, the natural presumption, in view of the almost universal practice, is that the ship is heading to wind and tide. If, in a particular instance, this assumption turns out to be wrong, a collision may well result.
>
> "It is unnecessary to pass upon this contention, for, if the Texan be held blameworthy for not mooring, she will be held to

a standard of care exceeding that habitually exercised by prudent mariners, and be punished for not doing what no merchant ship appears ever to have done in the Baltimore harbor. That would seem to be a severe measure, when the direct and proximate cause of the collision was the clear breach of duty on the part of the City of Richmond."

No Warning to "West Keats."

It is finally suggested by appellant that the "Boston Maru" should be charged with the responsibility for the collision because no warning was given the "West Keats" by the "Boston Maru." Complaint is made of the fact that Captain Gildez went to sleep in the cabin after he had anchored the "Boston Maru." The entire contention of appellant on this branch of the case is answered by Captain Gildez in testimony found on pages 337-339 of the Apostles:

"Q. If you had been on deck at the time the 'West Keats' was approaching, you could have given some sort of signal, couldn't you?

A. No, sir.

Q. Are you familiar with the rule respecting anchored vessels, that they shall give some sort of special signals on occasions when necessary?

A. There is a rule to that effect when it is foggy and thick.

Q. You don't consider that rule is applicable to clear weather?

A. No, sir.

Q. You don't know of any rule applying to clear weather requiring anchored vessels to give signals by noise or by lights if necessary?

A. If necessary, yes, but clear night, anchor lights burning, there is no reason in the world why it should be necessary. The man on the other ship can undoubtedly see your lights; he can see you are an anchored vessel then.

Q. So there was no possible reason for application of that rule in clear weather?

A. Not that I know of, sir.

Q. You consider the rule as applicable only to foggy weather?

A. Just foggy or bad weather.

Q. Now, if you had been on deck at the time the 'West Keats' was approaching you could have started the engines of the 'Boston Maru' and kicked her out of the channel very quickly, couldn't you?

A. No, sir.

Q. Couldn't you have swung her around so that she would have headed upstream again?

A. No, sir. I heard him testify that one minute they knew there was going to be a collision, the people on board the 'West Keats.' One minute wouldn't have given the engineers time to get even ready, so I wouldn't have known there was going to be any collision any quicker than they did.

Q. Well, if you had been on the stern of the 'Boston Maru,' looking over at the shore light, you could have made some sort of an estimate as to the distance she was from the Oregon shore, couldn't you?

A. If somebody had told me the 'West Keats' was going to run into us I would probably have gone to the stern and put out a duffle-bag over the side, but nobody told me that. I didn't even know the 'West Keats' was coming down the river, or any other ship."

The testimony shows that Captain Berry saw the lights of the "Boston Maru" two miles above the place of collision (Berry 137). One mile above the place of collision he made out these lights as those of a vessel at anchor (Berry 138, 100, 101, 117). No warning that the "Boston Maru" could have given would have advised the "West Keats" of any facts which were not already known to her pilot. Furthermore, Captain Gildez, if he had been on deck, would have had a right to expect that the "West Keats" would obey the law and pass the "Boston Maru" on the Washington side of the channel. The collision was not expected on the "West Keats" until one minute before it occurred (Berry 114).

Proctor for appellant cites no statute or regulation requiring an anchored vessel in the absence of fog to give warning to moving vessels in the vicinity. We contend that there is no such statute or regulation. In the absence of fog the riding lights of the vessel at anchor are the only warning which the statute requires.

"West Keats" Responsible.

The facts making out the responsibility of the "West Keats" are for the most part established by testimony which is clear and uncontroverted. It appears that the "West Keats" entered the Columbia River at midnight and that it was operated at full speed from that time until 1:43 A. M., which was one minute before the collision (Berry 96, 138; Jetts 454-455, 457; Gillette 408-410). The visibility was good (Swenson 380-381; Sayeki 465; Chiga 536; Gillette 408). There was an unobstructed view of the portion of the river in which the "Boston Maru" was anchored from Warrior Rock on (Allyn 262; Sullivan 198-199). Warrior Rock is three miles above the place of collision. Captain Berry, in charge of the navigation of the "West Keats," saw the lights of the "Boston Maru" two miles above the place of collision (Berry 137). He was uncertain what these lights were but he did not check his speed, continuing full speed ahead until one minute before the collision.

Captain Berry admits that he recognized the lights of the "Boston Maru" as those of a vessel at anchor when he was one mile above the place of collision (Berry 138, 100, 101, 117). He knew at that time that the stern of the vessel was turned toward the Oregon shore (Berry 117). It appears from his testimony that he knew these things when his vessel was opposite light 28-2. It will be found by an examination of the government chart, "West Keats' " Exhibit 1, that this point is

fifty-three hundred feet up the river in a straight line from the place of collision. By the course which the "West Keats" took it would be a longer distance. Mr. Gillette, the second officer on board the "West Keats," testifies that after the pilot recognized the lights ahead as those of an anchored vessel it would have been possible to pass the anchored vessel on the Washington side (Gillette 429). This was the clear duty of the navigator under the provisions of Section 7899 Compiled Statutes, U. S. Code, Title 33, Section 210. Captain Moran, an hour or so before, had taken the "Georgina Rolph" down the river, passing the "Boston Maru" on the Washington side (Moran 248). Three pilots of intelligence and experience testify that the "West Keats" could have been deflected to the Washington side of the channel one thousand to twelve hundred feet above the place of collision (Sullivan 199, 236; McNelly 276, 296; Gildez 313-314). There was plenty of room on the Washington side of the "Boston Maru" (Berry 121). The facts in the case are a demonstration that there was also enough room to pass on the Oregon side if the "West Keats" had been properly navigated. The "West Keats" did get by on the Oregon side without grounding (Berry 139; Swenson 390).

There is testimony on behalf of appellant that it would take half an hour or such a matter to stop the "West Keats." The fact is that after the collision the pilot got her headway off in about three minutes (Berry 122; Swenson 392). This

although the collision was a glancing blow only (Swenson 395). Thereafter the "West Keats" steamed up without difficulty on the Washington side of the "Boston Maru" (Berry 121; Swenson 385). Captain Baldy, in command of the "Siersted" (153-154) and another unidentified vessel also passed up the river on the Washington side of the "Boston Maru" (Berry 114-115; Swenson 385). The facts in the case are a demonstration that there was ample room and ample opportunity for the "West Keats" to pass the "Boston Maru" on the Washington side of the channel.

It further appears that shortly before the collision the "West Keats" failed to respond to her helm. The order was given by the pilot "starboard a bit" (Berry 108). The vessel failing to answer, the pilot gave the order "hard a starboard" (Berry 109). Again the "West Keats" failed to respond to her helm.

STATUTES.

The law applicable to the above state of facts we claim is clear and even statutory.

Section 7899, Compiled Statutes, U. S. Code, Title 33, Section 210, 30 Statutes at Large 101, is as follows:

> "In narrow channels every steam-vessel shall, when it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such vessel."

Section 7903, Compiled Statutes, 30 Statutes at Large 102, is as follows:

> "Nothing in these rules shall exonerate any vessel, or the owner, or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

DUTY TO OBSERVE.

In the construction of these statutes the courts lay upon every moving vessel the strict duty to maintain a vigilant outlook. Where there is no obstruction to the vision and no difficulty in navigating caused by wind, tide or current, the failure of the moving vessel to observe the anchored vessel and to avoid her is negligence for which the moving vessel is held to strict account. *The Europe,* 190 Fed. 475, 480 (C. C. A. 9).

Here the court said:

> "In his testimony the pilot of libelant's steamboat stoutly maintained that he did not see lights on the Europe until he climbed upon her forecastle after the collision, but, if her lights were visible so as to have been seen by him at a distance of one mile, they were sufficient to indicate the presence of the Europe, and the failure of the steamboat to avoid her was inexcusable. The attempt to account for the failure of both the pilot and the steamer's lookout to see both or either of the lights on the Europe upon the theory

that the forward light was obscured by the forestay to which it was suspended and the wrapping upon it, and by the jib boom with the furled sails thereon, is a complete failure."

"The fact appears by the testimony of both of them that the pilot and the lookout were immediately prior to discovering the Europe intent in looking for and trying to drift timber floating in the water. From this and the facts that the collision occurred and that they deny having seen the lights, which certainly were upon the Europe, there arises a necessary inference that they were negligent in not looking forward far enough and sweeping a space wide enough and high enough to see a light hung 17 feet and 6 inches above the forecastle deck of the Europe."

To the same effect

The R. G. Townsend, 205 Fed. 514.
The John G. McCullough, 232 Fed. 637, 638-639.
The Kathleen Tracy, 296 Fed. 711, 712.

The inability of the navigator to distinguish between the lights of the vessel at anchor and lights on shore will not excuse the moving vessel for colliding with the vessel at anchor.

The John G. McCullough, 232 Fed. 637, 638-639.

Where the field of vision is clear the failure of the officers on the bridge to observe a vessel at

anchor, whose lights are properly set, in time to avert a collision, is negligence for which the moving vessel will be held responsible.

> *The Oregon,* 158 U. S. 186, 39 L. Ed. 943.
> *The New York,* 175 U. S. 187, 204, 44 L. Ed. 126, 134.
> *The Europe,* 190 Fed. 475 (C. C. A. 9).

In *Pendleton Bros. v. Morgan,* 11 F. (2d) 67, the Circuit Court of Appeals for the Fourth Circuit said:

> "The observation of the light three-quarters of a mile away afforded ample time to avoid the collision, and those navigating the Pendleton were charged with a duty to see a light admittedly burning, which a vigilant lookout would have observed. *The failure to discover lights until too late to avoid a collision is tantamount to a failure to have a look out at all.*

Duty With Reference to Speed.

As above pointed out it appears without contradiction that the "West Keats" was operated at full speed from the time she entered the Columbia River until one minute before the collision, a distance in excess of fifteen miles and a period of one hour and forty-three minutes. This full speed headway, amounting to nearly if not quite ten knots an hour, was maintained after the pilot saw the lights which subsequently proved to be those of the "Boston Maru," and even after he knew that the lights were those of a ship at

anchor. Captain McNelly (Apostles 289) testifies that in such a case as that which confronted the "West Keats" the pilot should get the way off his ship and stop her. We claim the law to be well settled that a navigator must check his speed when uncertain as to the conditions ahead of him.

Hayne on the Rule of the Road at Sea, page 18, says:

> "When there is the slightest doubt or uncertainty from any cause, or where risk of collision is apparent—the vessel's headway should be stopped, and she should then be navigated with great caution until the uncertainty is cleared up."

To the same effect

The Owego, 71 Fed. 537, 544.

When confronted with danger or uncertainty it is the duty of a moving vessel to reverse her engines and stop.

The Maine, 2 F. (2d) 605, 607.

This is a decision of the Disttrict Court for the District of Oregon. The court says:

> "Among the specifications of negligence, it is asserted by the libelant that the Maine did not stop and reverse her engine in time to avoid striking the raft, and was improperly and carelessly navigated. These specifications, in my view, have been sustained by the evidence. The navigation officers were sea-

sonably apprised of the position of the Gamecock, and at once either signified or consented with her to a port to port passing. Only shortly subsequently the Maine became apprised that the Gamecock was incumbered with a tow, and saw the lights on the tow. The night was dark, and a heavy wind was blowing—almost, if not, a veritable gale. It was customary for boats to carry a tow of like construction and dimensions as the one attached to the Gamecock, and on the same course adopted, and the pilot of the Maine was not unaware of these conditions, and should have been forewarned of the probable situation at the time he became aware that the Gamecock had a tow of logs in charge. This was in ample time so to have managed her navigation as to readily avoid the threatened danger. She should have been brought to a full stop at once, or very soon after she was put at half-speed ahead. Such a maneuver would have afforded time to clear up the situation, and the collision could have been avoided."

The Buenos Aires, 5 F. (2d) 425, 428.

In this case the Court of Appeals for the Second Circuit said:

"It was the duty of the Buenos Aires when she discovered the Windrush ahead, without knowing definitely the course the latter was pursuing, to stop and reverse in the face of the manifest danger of the situation. In The Cushing (C. C. A.), 292 F. 560, 563, 565, this court held that the failure of the steamer to stop and reverse her engines in the face of danger was sufficient to fasten liability upon

her. We there said: 'Failure to reverse until just before the collision is indicated by the log. Steam vessels must stop their engines in the presence of danger, or even anticipated danger, and the failure to do so has been the cause of condemnation of many vessels, where collisions have occurred. The New York, 175 U. S. 187, 20 S. Ct. 67, 44 L. Ed. 126.' "

These principles are also recognized by

The Brinton, 50 Fed. 581.
The Libby Maine, 3 F. (2d) 79, 80 (D. C. Wash.)
The Lizzie M. Walker, 3 F. (2d) 921, 922 (C. C. A. 4).

TEST OF SPEED.

In Hayne on the Rule of the Road at Sea, page 19, it is said:

"The test of proper speed, in all cases, is the ability of the vessel to stop her headway in the presence of danger."

It is dangerous to pass an anchored or incumbered vessel at full speed in the night time.

The Howard Reeder, 207 Fed. 929, 933 (C. C. A. 4).
The Hamilton, 212 Fed. 1016.

The Alexander Folsom, 52 Fed. 403, 410..

Here the Circuit Court of Appeals for the Sixth Circuit said:

"It is said by the learned district judge 'that the tendency to sheer from suction in that channel by vessels passing under the conditions of this case was so well known by skillful seamen that the master of the Mitchell should have considered it possible, if not probable, on the part of the Devereaux, and have so far guarded against it as to have had his own vessel in perfect control, and his wheel on the starboard, so as to have headed his vessel to port, and have been able to put her in that course, promptly, when the emergency made it necessary.'

"If this proposition is correct, should not the master of the Devereaux have considered a sheer on her part possible, if not probable, and have so far guarded against it as to have had his own vessel in perfect control, and her wheel on the starboard, so as to have headed his vessel to port? Instead of doing this, he was proceeding down the channel with his wheel steadied about midships, and did not order it to starboard till after discovering the sheer. It would hardly be a fair or consistent rule to put upon the Mitchell the duty of anticipating and guarding against the Devereaux sheering, and at the same time exonerate the Devereaux from the obligation of taking precautions to prevent or counteract the alleged well-known tendency to sheer."

It is negligence for a moving vessel to approach too close to another vessel when there is room in the channel for safe passage.

The Chatham, 52 Fed. 396, 399 (C. C. A. 4).

DUTY TO KEEP TO THE RIGHT.

Section 7899 of the Compiled Statutes, U. S. Code, Title 33, Section 210, which we have quoted above, plainly required the "West Keats" to keep to the right and to pass the "Boston Maru" between the latter vessel and the Washington shore. It was the duty of the "West Keats" to obey this statute.

The Kathleen Tracy, 296 Fed. 711.
Bisso Towboat Co. v. U. S., 6 F. (2d) 132 (C. C. A. 5).

It will be contended on the part of the "West Keats" that it was customary for vessels to proceed close to the Oregon shore at the point in question, but a custom cannot be relied on to repeal or evade a statute which is applicable. The Circuit Court of Appeals for the Ninth Circuit speaking through Judge Hanford has so held with reference to this particular statute.

Occidental Company v. Smith, 74 Fed. 261, 267-268.

> "This case affords an opportunity which should not be lost for emphasizing another important rule for preventing collisions, which must be observed by navigators. This is found in article 21 of the international rules, above referred to, and article 25 of the act of August 19, 1890 (1 Supp. Rev. St. (2d Ed.) 781-788), which reads as follows: 'In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies

on the starboard side of such vessel.' The statutes of California contain a similar provision, to which reference was made in the opinion of the district judge. This rule was violated by the Oceanic in entering the Golden Gate on the occasion of the disaster involved in these suits, and the only excuse offered for taking the north side is that it is customary for large vessels in entering to take the north side. We cannot find in the testimony or argument of counsel any attempt to give a reason for the alleged custom, and, if it be true that there is such a custom, it is bad in principle, and contrary to law, and the courts will not recognize it as affording any ground for exempting a vessel from liabilities incurred by disregarding the law."

STATUTE APPLICABLE.

It is contended that Section 7899 of the Compiled Statutes is a passing rule and is inapplicable to a collision between a moving and an anchored vessel. In support of this contention appellant cites

The John H. Starin, 122 Fed. 236, 239.

There is a passing remark by the court in the above case which gives some color to appellant's contention, but this remark was not the ground work of the decision. The case turned on the failure of the anchored vessel to put out her riding lights.

Appellant also cites on this subject

The Belfast, 226 Fed. 362, 366.

What is said on the subject does not carry to our minds the conclusion which appellant's counsel puts upon it. The case was one of flagrant violation of the law and of the port regulations. The language used by the court is designed to emphasize the court's view of the fault of the anchored vessel in violating the law and the regulations.

We submit that the above statute is too clear to require construction. It is as follows:

> "In narrow channels every steam-vessel shall, when it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such vessel."

Effect of Violation of Statute.

The testimony clearly showing that the "West Keats" violated the above statute, there is a strong presumption that the "West Keats" was solely responsible for the damage caused thereby. The rule is stated thus by the District Court for Maryland in

The Norfolk, 297 Fed. 251:

> "The burden of proof is upon the Norfolk to show that her failure to abide by the rule had no connection with the accident which followed. It has been repeatedly held that the breach of a statutory rule is such a fault as to throw upon the offending vessel the burden of proving, not merely that the breach might not have been one of the causes of the collision, or that it probably was not, but that it could not have been."

Suction From Bank no Defense.

It is the contention of appellant that in her endeavor to pass between the "Boston Maru" and the Oregon shore, the "West Keats" approached too close to the Oregon shore and came within the reach of suction from the bank. It is contended that this caused the bow of the "West Keats" to sheer over to starboard and to collide with the "Boston Maru." If the facts sustained this contention it would not excuse the "West Keats."

The Howard Reeder, 207 Fed. 929, 933.

Here the Circuit Court of Appeals for the Fourth Circuit said:

> "The Columbia was presumed to know the depth of the channel, of the existence of the deep-water channel and its width, of the difference in the draft of the ship, in running at high or low speed, and of the danger of sheering in passing in too close proximity to the banks. Whether this collision occurred because of the Columbia's sheer, from running too close to the channel's banks, or because, while running at such speed, she put her wheel hardaport and suddenly reversed, and from the kick incident thereto, is utterly immaterial since in either event the sheer was caused by the excessive rate of speed of the Columbia at a time when prudence required that she should have slowed down. Without such sheer there manifestly could have been no collision in 300 feet of clear channel way. The Columbia's navigator should not have waited to slow down until

she was abreast of the tug, as he admits he did, and until his vessel, as he says, began to 'run,' as he calls it, or sheer from the bank. She was at the time only some 450 feet away from the barge, and manifestly the effort to check her speed, then for the first time made, was too late to accomplish any real good. Good seamanship required that she should have anticipated danger in such a maneuver, and for the consequences arising therefrom she can neither escape responsibility nor justly call upon others to share her losses."

The Hamilton, 212 Fed. 1016.

Here the District Court for the District of Virginia said:

"The ship's position is that in the effort to pass the barge, which as she claims was in the eastern portion of the channel, she proceeded too close to the eastern bank thereof, smelled bottom, and as a result the ship failed to respond to her helm, and took the sheer mentioned, bringing about the disaster.

"The Hamilton was charged with knowledge of the width of the channel, of the danger of proceeding too close to its banks, and especially so at a high rate of speed, as she would thereby the more quickly smell bottom. Good seamanship required that she should have anticipated these dangers, and in no case should she have taken a chance to pass this incumbered vessel at full speed in the night time, without knowing whether there was ample room for her to do so; and she cannot avoid the consequences of the collision, arising from these obvious omis-

sions on her part, nor call upon others, themselves free from fault, to share her losses."

To the same effect

The Monroe C. Smith, 201 Fed. 569, 572.

No Suction.

The admitted facts of the case demonstrate that there was no suction. Captain Sullivan (Apostles 203-204) explains the cause and effect of suction:

"A. * * * The suction is at the stern of a ship; in passing a shoal it is the stern of the ship that sucks towards the shore, not the bow, and of course the stern going towards the shore, the bow naturally goes in the course in which the suction is causing the ship to draw, and we say that she runs away from shore. The fact of the matter is, that the stern is drawn toward the shore by this action, probably by the propellor, being the largest moving object around, displacing the water, and the bow following the course of the suction has caused this bow to draw. Of course if she is moving—the faster she is moving the faster she will go off in that direction; the faster—the further the influence would be on the suction.

Q. The faster the vessel is going, the greater the influence of the suction?

A. Yes, sir."

Captain Sandstrom testifies (Apostles 171-172) that suction could not influence a vessel if it is

headed towards the shore or nearly so. The admitted facts of the case and the photographs in evidence show that the "West Keats" at her starboard hawse pipe, four or five feet back from her bow, collided with the starboard quarter of the "Boston Maru." This indisputable fact shows that the "West Keats" at the time of the collision was headed toward the Oregon shore. She could not otherwise have struck the "Boston Maru" on the starboard side of the former vessel. Captain Sullivan (201-205, 211) and Captain Allyn (264-265) ("Boston Maru" Exhibit "N") testify as to the conclusions to be drawn from the physical facts of the accident which are beyond all dispute. Captain Berry, the pilot of the "West Keats," refuses to testify as to whether his stern or his bow was closest to the Oregon shore at and before the time of the accident (Apostles 133-134). He is wholly unable to explain the collision on the theory of suction if the bow of the "West Keats" was closer to the shore than her stern, and the physical facts demonstrate that this was the case.

It must be conceded that the "West Keats" ran into the "Boston Maru," although the latter vessel was visible for three miles up the river and was actually observed by the pilot of the "West Keats" two miles above the place of collision. The "West Keats" approached at full speed although her pilot admits he was uncertain what the lights ahead meant. One mile above the place of the collision the pilot of the "West Keats" recognized

the lights as those of a vessel at anchor whose stern was in the direction of the Oregon shore. He nevertheless proceeded at full speed until one minute before the collision. The physical facts demonstrate that it was possible for the "West Keats" to pass between the "Boston Maru" and the Oregon shore. It was also possible for her to comply with her statutory duty under Section 7899 Compiled Statutes, and pass to the Washington side of the "Boston Maru." It is argued that to pass to the Washington side of the "Boston Maru" would require the "West Keats" to get off her ranges, but the evidence is that for at least half a mile at the place of the collision there is no range to be followed (Berry 104).

On the whole case we contend that this appellant has signally failed to show manifest error in the conclusions of the District Court.

APPELLANT'S AUTHORITIES

We invite the following suggestions with reference to the authorities cited on behalf of appellant.

The Europe, 190 Fed. 475.

In this case, and at page 476 of the report, the court said:

> "At the time of the collision the Europe was anchored in the deep-water channel of the Willamette River, *and in the usual track of vessels plying up and down the river.*"

Violation of Harbor Regulations.

Several of the cases relied upon by appellant are cases where the decision of the court turned on the fact that the anchored vessel was violating harbor regulations.

In *The Margaret J. Sanford,* 203 Fed. 331, and in *U. S. v. St. Louis Transportation Co.,* 184 U. S. 248, the anchored vessel had violated a port rule requiring all vessels to report to the harbor master and to be assigned a place for anchorage.

In *The Belfast,* 226 Fed. 362, the vessel in question was anchored at the entrance of Boston harbor in violation of one of the harbor regulations. She remained at the prohibited anchorage ground after having been notified by the proper authorities to move.

Light Draft Vessels.

In *The Itasca,* 117 Fed. 885, and *The City of Birmingham,* 138 Fed. 555, the anchored vessels were dredges of light draft which could anchor almost anywhere in safety. Their situation is very different from that of a vessel heavily loaded and drawing twenty-six feet one inch of water.

Facts Distinguishable.

In *Culbertson v. Shaw,* 18 How. 584, a flatboat was tied to the bank. A steamer endeavoring to land collided with the flatboat and was held liable for all the damages.

In *The John H. Starin,* 122 Fed. 236, the anchored vessel was held liable because of her failure to keep her riding lights burning. The evidence is clear and uncontradicted that the riding lights of the "Boston Maru" were burning brightly at all times.

In *The Ogemaw,* 32 Fed. 919, the anchored vessel was held liable for failure to take steps to avoid the collision after the danger became apparent. The principle announced in this case is not applicable to the facts in the case at bar. The pilot and master of the "West Keats" did not expect a collision until one minute before the impact. The "Boston Maru" could not anticipate a collision at any earlier time, and there was nothing which its master or pilot could do to avert the collision after the danger became apparent.

Respectfully submitted,

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Ralph H. King,

Proctors for Appellee.